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No. 07-632

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

WAGNER-MEINERT, INC.
Petitioner,
v.
EDA CONTROLS CORP.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO BRIEF IN OPPOSITION

Pursuant to the United States Supreme Court Rule 15.6, Petitioner submits the following short response addressing new points raised in Respondent's Brief in Opposition.

In Respondent's Brief in Opposition, both the facts and the law have been misstated in significant respects. That is done as a slanted interpretation of the facts and law which continues to urge misapplication or confusion of the requirements of a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Therefore, even Respondent's brief demonstrates the need for clarification and instruction from this honorable Court regarding application of such a motion for judgment on the

pleadings.[1] This case, Petitioner submits, demonstrates the need for review and instruction.

Many courts do either properly apply or give lip service to the application of the principle that in construing a pleading such as the complaint herein, all of the allegations of fact are to be taken as true and all inferences favorable to the non-movant are to be drawn. *Bryson v. Brand Insulations, Inc.*, 621 F. 2d 556 (3rd Cir. 1980); *Grease Monkey Intern., Inc. v. Watkins*, 808 F.Supp. 111 (D. Conn. 1992) and several other examples previously cited. Respondent, however, has obviously taken the opposite position - that facts are to be inferred in favor of movant and

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[1] Petitioner initially demonstrated on pages 12-20 of the Petition for Writ of Certiorari the wide range of interpretation and application of a motion for judgment on the pleadings in several jurisdictions.

against the pleader/non-movant, and the courts below have discretion to do so.

Among the many examples demonstrated by Respondent's Brief in Opposition to the Petition are the following:

1. The complaint "makes oblique reference to possible 'oral' or 'implied' agreements", but does not allege any of the material terms attendant to those agreements, including the subject matter of the contracts.

   RESPONSE: That is a clear misstatement of fact. The complaint specifically alleges such agreements - even though not entirely written or fully described in the quotation and purchase order as to properly training the customer's employees in the operation and maintenance of the system, provision of specific services and the supply of equipment fit for intended use. They indeed may be oral or, in other words, "expressed" as well as implied.

2. Respondent repeatedly references the "*possible* existence of additional oral contracts" that "*might* have afforded WMI some basis for recovery" (Respondent's Brief, p. 12).

RESPONSE: The complaint does not use those words.

3. Respondent makes repeated statements and arguments supporting application of the parol evidence rule and making reference to a "written contract", when in fact there is no document at all which constitutes a contract which is signed by both of the parties (Respondent's Brief, pp. 14-16).

RESPONSE: This argument constitutes factual misstatement and cites law in support of the parol evidence rule which clearly does not apply. The argument in support of the parol evidence rule, including *Glazer v. Lehman Brothers, Inc.*, 394 F.3d 444 (2005) and *Galmish v. Cicchini*, 90 Ohio St. 3d 22 (2000), concern detailed written and signed agreements which contained integration clauses. *Galmish*, supra, at 788. Both cases relied upon by Respondent, although initially cited and referenced by Petitioner, involve express written contracts with an integration clause. Examples of an integration clause include the following:

> This agreement constitutes the entire understanding of the parties, and may be modified only by a signed writing of both parties, excepting purchaser's right to extend this contract, and

> is binding on their heirs, assigns and successors of the parties.

Country Mart Coop. v. Smith, 124 Ohio App. 3d 159, at 171 (1997).

An integrated contract is a written contract which contains all the terms and conditions of the agreement. 17 Am. J. 2d Contracts, §260. It is only construing all of the allegations of the Complaint and attachments in favor of Respondent - as opposed to Petitioner - that the parol evidence rule has any application here, and it is a flat out factual misrepresentation that any document contained an integration clause here. They did not.

4. Respondent misapplies both the facts and the law by attempting to limit its liability to the relatively small price ($13,228) mentioned on the EDA quote, rather than the multi-million dollar cost Petitioner incurred due to Respondent's failure to comply with its agreements.

RESPONSE: Respondent ignores basic legal principles such as consequential damages and the legal effect of indemnity. Neither concept in any way limits Respondent's potential liability to the amount of the price quoted. None of the documents generated by Respondent contained any such limitation. It is again an argument without any factual or legal basis whatsoever.

5. Respondent mischaracterizes Petitioner's argument, stating as follows:

> Specifically, Petitioner requests the Court to hold that the "predominant purpose test" should only be applied to mixed contracts **by the jury or trier of fact, and not by the trial court, "as a matter of law".** The invitation to adopt such a rule should be declined.

RESPONSE: Again, Respondent misstates the facts. What Petitioner has requested is a determination and finding that judgment on the pleadings was inappropriate. Given the detailed allegations of the Complaint which should be presumed true in the context of a motion for judgment on the pleadings, said motion should have been denied and discovery permitted - after which either a motion for summary judgment or trial, depending upon

the circumstances and the evidence, should occur.

> This case, it is submitted, is appropriate to illustrate that such a decision should not be made as a matter of law **before any discovery or trial**. (Petition, p. 26)

Petitioner does not, as Respondent represents, request this Court to hold that the "predominant purpose test" in mixed contracts of sales and service must always be determined by a jury or finder of fact. There is no such statement or argument at all in the Petition for Writ of Certiorari. The essence and true characterization is that given the detailed allegations of the Complaint in this case and under any similar circumstances, discovery should be allowed and the dispositive motion for judgment on the pleadings - without any discovery - should be denied.

CONCLUSION

Respondent's Brief demonstrates that attorneys, courts and businesses providing goods and services as part of our economy would benefit from acceptance of this dispute. Petitioner respectfully requests this Court to not be influenced by the clear misstatements of fact and law contained in Respondent's Brief in Opposition to the Petition for Writ of Certiorari in this matter.

Respectfully submitted,
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